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19 UNITED STATES DISTRICT COURT  
20 NORTHERN DISTRICT OF CALIFORNIA

21 JOSE ALBINO LUCERO JR., on Behalf of  
22 Himself and all Others Similarly Situated,

23 Plaintiff,

24 v.

25 SOLARCITY CORP.,

26 Defendant.

Case No. 3:15-cv-05107-RS

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR CLASS  
CERTIFICATION**

Date: March 9, 2017  
Time: 1:30 PM  
Courtroom 3, 17th Floor

Hon. Richard G. Seeborg

27 REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED  
28

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** on March 9, 2017 at 1:30 p.m., or as soon thereafter as  
4 the matter may be heard by the above-captioned Court, located at 450 Golden Gate Avenue, San  
5 Francisco, CA 94102, Courtroom 3, 17th Floor, in the courtroom of the Honorable Richard G.  
6 Seeborg, Plaintiff will and hereby does move the Court to certify the classes and subclasses  
7 described herein, appoint Plaintiff as a class representative, and appoint Bursor & Fisher, P.A. and  
8 Nathan & Associates, APC as class counsel.

9 This motion is made on the grounds that certification is proper given that Plaintiff has met  
10 each requirement of Rule 23(a), Rule 23(b)(3) and Rule 23(b)(2).

11 This motion is based on the attached Memorandum Of Points And Authorities, the  
12 accompanying Declaration of Joshua D. Arisohn, Declaration of Randall A. Snyder, Report of Anya  
13 Verkhovskaya, the pleadings and papers on file herein, and any other written and oral arguments that  
14 may be presented to the Court.

15 **CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

16 Whether the Court should certify the classes and subclasses described herein, appoint  
17 Plaintiff as class representative, and appoint Bursor & Fisher, P.A. and Nathan & Associates, APC  
18 as class counsel.

19  
20 Dated: December 14, 2016

Respectfully submitted,

21 **BURSOR & FISHER, P.A.**

22 By: /s/ Joshua D. Arisohn  
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**TABLE OF CONTENTS**

**PAGE(S)**

I. INTRODUCTION ..... 1

II. THE PROPOSED CLASSES AND SUBCLASSES..... 4

III. THE TELEPHONE CONSUMER PROTECTION ACT..... 6

IV. THE LEGAL STANDARD FOR CLASS CERTIFICATION ..... 8

V. THE REQUIREMENTS OF RULE 23(a) ARE READILY MET ..... 8

    A. Numerosity Is Satisfied..... 8

    B. Commonality Is Satisfied..... 9

    C. Plaintiff’s Claims Are Typical ..... 10

    D. Plaintiff Will Adequately Represent The Classes and Subclasses..... 11

VI. THE PROPOSED CLASSES AND SUBCLASSES SATISFY RULE 23(b)(3)..... 12

    A. Common Questions of Fact or Law Predominate..... 12

    B. A Class Action Is Superior To Numerous Individual TCPA Actions ..... 17

    C. The Proposed Classes And Subclasses Are Ascertainable ..... 18

VII. THE PROPOSED CLASSES AND SUBCLASSES SATISFY RULE 23(b)(2)..... 21

VIII. CONCLUSION..... 22

## TABLE OF AUTHORITIES

PAGE(S)

### CASES

<i>Abdeljalil v. Gen. Elec. Capital Corp.</i> , 306 F.R.D. 303 (S.D. Cal. 2015) .....	7, 20
<i>Amchem Prod., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	17
<i>Amgen Inc. v. Connecticut Retirement Plans and Trust Funds</i> , 133 S. Ct. 1184 (2013).....	8, 13
<i>Arnott v. U.S. Citizenship &amp; Immigration Servs.</i> , 290 F.R.D. 579 (C.D. Cal. 2012) .....	8
<i>Avio, Inc. v. Alfoccino, Inc.</i> , 311 F.R.D. 434 (E.D. Mich. 2015) .....	14, 15
<i>Balbarin v. N. Star</i> , 2011 WL 211013 (N.D. Ill. Jan. 21, 2011) .....	16
<i>Bates v. Dollar Loan Ctr., LLC</i> , 2014 WL 5469221 (D. Nev. Oct. 28, 2014) .....	20
<i>Bee, Denning, Inc. v. Capital All. Grp.</i> , 310 F.R.D. 614 (S.D. Cal. 2015) .....	6, 19
<i>Birchmeier v. Caribbean Cruise Line, Inc.</i> , 302 F.R.D. 240 (N.D. Ill. 2014).....	7, 19
<i>Blackie v. Barrack</i> , 524 F.2d 891 (9th Cir. 1975) .....	11
<i>Booth v. Appstack, Inc.</i> , 2015 WL 1466247 (W.D. Wash. Mar. 30, 2015) .....	7, 14, 19
<i>Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.</i> , 249 F.R.D. 334 (N.D. Cal. 2008).....	9
<i>CE Design v. Beaty Const., Inc.</i> , 2009 WL 192481 (N.D. Ill. Jan. 26, 2009) .....	16
<i>Chapman v. Wagener Equities, Inc.</i> , 2014 WL 540250 (N.D. Ill. Feb. 11, 2014) .....	16
<i>Chun-Hoon v. McKee Foods Corp.</i> , 2006 WL 3093764 (N.D. Cal. Oct. 31, 2006).....	13
<i>Elkins v. Medco Health Solutions, Inc.</i> , 2014 WL 1663406 (E.D. Mo. Apr. 25, 2014).....	16
<i>G.M. Sign, Inc. v. Finish Thompson, Inc.</i> , 2009 WL 2581324 (N.D. Ill. Aug. 20, 2009) .....	19

1	<i>G.M. Sign, Inc. v. Franklin Bank, S.S.B.,</i>	
2	2008 WL 3889950 (N.D. Ill. Aug. 20, 2008) .....	15
3	<i>Gaines v. Law Office of Patenaude &amp; Felix, A.P.C.,</i>	
4	2014 WL 3894348 (S.D. Cal. June 12, 2014).....	16
5	<i>Gen. Tel. Co. of Sw. v. Falcon,</i>	
6	457 U.S. 147 (1982).....	9
7	<i>Grant v. Capital Mgmt. Servs., L.P.,</i>	
8	449 Fed. Appx. 598 (9th Cir. 2011).....	16
9	<i>Hanlon v. Chrysler Corp.,</i>	
10	150 F.3d 1011 (9th Cir. 1998) .....	10, 11, 13
11	<i>Hanon v. Dataproducts Corp.,</i>	
12	976 F.2d 497 (9th Cir. 1992) .....	8, 10
13	<i>Heinrichs v. Wells Fargo Bank, N.A.,</i>	
14	2014 WL 985558 (N.D. Cal. Mar. 7, 2014).....	16
15	<i>Hinman v. M &amp; M Rental Ctr., Inc.,</i>	
16	545 F. Supp. 2d 802 (N.D. Ill. 2008) .....	16
17	<i>In re Emulex Corp.,</i>	
18	210 F.R.D. 717 (C.D. Cal. 2002) .....	12
19	<i>In re Yahoo Mail Litig.,</i>	
20	308 F.R.D. 577 (N.D. Cal. 2015).....	21
21	<i>In the Matter of Rules &amp; Regulations Implementing the Tel. Consumer Prot. Act of 1991,</i>	
22	27 F.C.C. Rcd. 1830 (2012).....	17
23	<i>Ira Holtzman, C.P.A. v. Turza,</i>	
24	728 F.3d 682 (7th Cir. 2013) .....	16
25	<i>James v. JPMorgan Chase Bank, N.A.,</i>	
26	2016 WL 6908118 (M.D. Fla. Nov. 22, 2016) .....	14
27	<i>Kamar v. Radio Shack Corp.,</i>	
28	254 F.R.D. 387 (C.D. Cal. 2008) .....	14
	<i>Kernats v. Comcast Corp.,</i>	
	2010 WL 4193219 (N.D. Ill. Oct. 20, 2010).....	14
	<i>Knutson v. Schwan's Home Serv., Inc.,</i>	
	2013 WL 4774763 (S.D. Cal. Sept. 5, 2013).....	15, 18, 19
	<i>Krakauer v. Dish Network L.L.C.,</i>	
	311 F.R.D. 384 (M.D.N.C. 2015) .....	8
	<i>Kristensen v. Credit Payment Servs.,</i>	
	12 F. Supp. 3d 1292 (D. Nev. 2014).....	17

1	<i>Lee v. Stonebridge Life Ins. Co.</i> ,	
2	289 F.R.D. 292 (N.D. Cal. 2013).....	6, 15
3	<i>Mace v. Van Ru Credit Corp.</i> ,	
4	109 F.3d 338 (7th Cir. 1997) .....	17
5	<i>Mainstream Mktg. Servs., Inc. v. F.T.C.</i> ,	
6	358 F.3d 1228 (10th Cir. 2004) .....	7, 8
7	<i>Manno v. Healthcare Revenue Recovery Grp., LLC</i> ,	
8	289 F.R.D. 674 (S.D. Fla. 2013).....	15
9	<i>McCrary v. Elations Co., LLC</i> ,	
10	2014 WL 1779243 (C.D. Cal. Jan. 13, 2014) .....	18
11	<i>Mendez v. C-Two Grp., Inc.</i> ,	
12	2015 WL 8477487 (N.D. Cal. Dec. 10, 2015).....	6, 17
13	<i>Moore v. PaineWebber, Inc.</i> ,	
14	306 F.3d 1247 (2d Cir. 2002).....	13
15	<i>Moreno v. AutoZone, Inc.</i> ,	
16	251 F.R.D. 417 (N.D. Cal. 2008).....	20
17	<i>Mullins v. Direct Digital, LLC</i> ,	
18	795 F.3d 654 (7th Cir. 2015) .....	14
19	<i>Ott v. Mortg. Inv'rs Corp. of Ohio</i> ,	
20	65 F. Supp. 3d 1046 (D. Or. 2014) .....	16
21	<i>Ries v. Arizona Beverages USA LLC</i> ,	
22	287 F.R.D. 523 (N.D. Cal. 2012).....	21, 22
23	<i>Rodriguez v. Hayes</i> ,	
24	591 F.3d 1105 (9th Cir. 2009) .....	9
25	<i>Sailola v. Mun. Servs. Bureau</i> ,	
26	2014 WL 3389395 (D. Haw. July 9, 2014).....	16
27	<i>Satterfield v. Simon &amp; Schuster, Inc.</i> ,	
28	569 F.3d 946 (9th Cir. 2009) .....	2, 4, 16, 17
	<i>Saulsberry v. Meridian Fin. Servs., Inc.</i> ,	
	2016 WL 3456939 (C.D. Cal. Apr. 14, 2016) .....	20
	<i>Shupe v. JPMorgan Chase Bank of Ariz.</i> ,	
	2012 WL 1344820 (D. Ariz. Mar. 14, 2012).....	16
	<i>Smith v. Cardinal Logistics Mgmt. Corp.</i> ,	
	2008 WL 4156364 (N.D. Cal. Sept. 5, 2008) .....	13
	<i>Staton v. Boeing Co.</i> ,	
	327 F.3d 938 (9th Cir. 2003) .....	11

1	<i>Steinfeld v. Discover Fin. Servs.</i> ,	
2	2014 WL 1309352 (N.D. Cal. Mar. 31, 2014).....	18
3	<i>Stern v. DoCircle, Inc.</i> ,	
4	2014 WL 486262 (C.D. Cal. Jan. 29, 2014) .....	15, 19
5	<i>Taylor v. Universal Auto Grp. I, Inc.</i> ,	
6	2014 WL 6654270 (W.D. Wash. Nov. 24, 2014) .....	17
7	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
8	131 S. Ct. 2541 (2011).....	9, 10
9	<i>Wang v. Chinese Daily News, Inc.</i> ,	
10	737 F.3d 538 (9th Cir. 2013) .....	13
11	<i>Whitaker v. Bennett Law, PLLC</i> ,	
12	2014 WL 5454398 (S.D. Cal. Oct. 27, 2014) .....	15
13	<i>Wolin v. Jaguar Land Rover N. Am., LLC</i> ,	
14	617 F.3d 1168 (9th Cir. 2010) .....	12
15	<i>Wolph v. Acer Am. Corp.</i> ,	
16	272 F.R.D. 477 (N.D. Cal. 2011).....	18
17	<i>Zinser v. Accufix Research Inst., Inc.</i> ,	
18	253 F.3d 1180 (9th Cir. 2001) .....	8
19	<b>STATUTES</b>	
20	47 U.S.C. § 227.....	1, 6, 16
21	47 U.S.C. § 227(b) .....	6
22	47 U.S.C. § 227(b)(1)(A).....	2
23	47 U.S.C. § 227(b)(3)(C) .....	14
24	47 U.S.C. § 227(c) .....	7
25	47 U.S.C. § 227(c)(5).....	7
26	<b>RULES</b>	
27	Fed. R. Civ. P. 23.....	passim
28	Fed. R. Civ. P. 23(a) .....	passim
	Fed. R. Civ. P. 23(b) .....	passim
	Fed. R. Civ. P. 23(g) .....	12
	<b>REGULATIONS</b>	
	47 C.F.R. § 64.1200(c).....	7

1	47 C.F.R. § 64.1200(e).....	7
---	-----------------------------	---

2	<b>OTHER AUTHORITIES</b>	
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3	7AA Wright & Miller, Fed. Prac. & Proc. § 1778 (3d ed. 2011) .....	13
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4	Newberg on Class Actions § 12:2.....	14
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1 **I. INTRODUCTION**

2 Plaintiff Jose Albino Lucero Jr. ("Plaintiff") alleges that Defendant SolarCity Corp.  
3 ("Defendant" or "SolarCity") called him and class and subclass members using automatic telephone  
4 dialing systems ("ATDS" or "autodialer"), without their prior express consent, and despite the fact  
5 that they are registered on the national Do Not Call ("NDNC") list, in violation of the Telephone  
6 Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 SolarCity is a massive company and it buys leads from lead generators on a massive scale.<sup>1</sup>

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 <sup>1</sup> Earlier this year, SolarCity accepted a bid by Tesla Motors Inc. to buy the company for \$2.6  
27 billion. *SolarCity accepts Tesla's \$2.6 billion offer; both shares fall*, Reuters (Aug. 1, 2016),  
28 available at <http://www.reuters.com/article/us-solarcity-m-a-tesla-idUSKCN10C26O> (last checked  
Dec. 14, 2016).

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Snyder Decl. ¶¶ 64, 66 and 68; *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (“When evaluating the issue of whether equipment is an ATDS, the statute’s clear language mandates that the focus must be on whether the equipment has the *capacity* to store or produce telephone numbers to be called, using a random or sequential number generator.”) (original emphasis) (internal quotation marks omitted). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 The TCPA prohibits calling consumers with autodialers absent prior express consent. 47

2 U.S.C. § 227(b)(1)(A). [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 Throughout the class period, Defendant's compliance policies were slipshod. [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 One of the consumers receiving unwanted calls from Defendant was Plaintiff Jose Albino  
13 Lucero Jr.. Plaintiff's caller ID [REDACTED] show that SolarCity called Plaintiff  
14 six times [REDACTED]. Arisohn Decl. Ex. O (LUCERO000020-23); Verkhovskaya Rpt.  
15 ¶ 31, Ex. G. Defendant placed these calls to Plaintiff's cellular phone. *Id.* Ex. P (LUCERO000012-  
16 18); Ex. Q (Lucero Dep.) at 55:24-56:6, Ex. R (SCPROD00029795). Plaintiff never consented to  
17 receiving phone calls from Defendant. *Id.* Ex. Q (Lucero Dep.) at 52:29-21, 158:16-21. [REDACTED]  
18 [REDACTED]

19 [REDACTED] Not only did Plaintiff never consent to receiving these calls from Defendant,  
20 but he has been on the NDNC list since at least 2010. *Id.* Ex. S (LUCERO000004-06); Ex. Q  
21 (Lucero Dep.) at 74:7-20. Congress passed the TCPA precisely to discourage these kinds of  
22 harassing phone calls.

## 23 **II. THE PROPOSED CLASSES AND SUBCLASSES**

24 Defendant's calls to consumers violated the TCPA in two different ways. First, Defendant  
25 placed calls using an autodialer without the prior express consent of call recipients. Accordingly,  
26 Plaintiff seeks certification of an **Autodialer Class**, defined as:

27 All individuals in the United States who received one or more calls on  
28 their cellular telephones from SolarCity Corp. from November 6, 2011

1 to the date that class notice is disseminated, where such calls were  
2 made through the use of an automated telephone dialing system.

3 The Autodialer Class contains two subgroups for whom the lack of consent is particularly clear: (A)  
4 call recipients for whom Defendant has [REDACTED] indicating consent, and (B) call recipients  
5 for whom Defendant has [REDACTED]

6 [REDACTED]. Accordingly, Plaintiff seeks certification of two  
7 Autodialer Subclasses. **Autodialer Subclass A** is defined as:

8 All individuals in the United States who received one or more calls on  
9 their cellular telephones from SolarCity Corp. from November 6, 2011  
10 to the date that class notice is disseminated, where such calls were  
11 made through the use of an automated telephone dialing system, [REDACTED]

12 **Autodialer Subclass B** is defined as:

13 All individuals in the United States who received one or more calls on  
14 their cellular telephones from SolarCity Corp. from November 6, 2011  
15 to the date that class notice is disseminated, where such calls were  
16 made through the use of an automated telephone dialing system, [REDACTED]

17 Second, Defendant violated the TCPA by placing calls to consumers registered on the NDNC list.

18 Accordingly, Plaintiff seeks certification of a **NDNC Class**, defined as:

19 All individuals registered on the National Do Not Call Registry whom  
20 SolarCity Corp. called more than one time in a 12-month period on  
21 their cellular or landline phone where each call was made more than  
22 30 days after registration.

23 Like the Autodialer Class, the NDNC Class contains two subgroups for whom a lack of consent is  
24 particularly clear: (A) call recipients for whom Defendant has [REDACTED] indicating consent,  
25 and (B) call recipients for whom Defendant has [REDACTED]

26 [REDACTED] Accordingly, Plaintiff  
27 seeks certification of two NDNC Subclasses. **NDNC Subclass A** is defined as:

28 All individuals registered on the National Do Not Call Registry whom  
SolarCity Corp. called more than one time in a 12-month period on  
their cellular or landline phone where each call was made more than  
30 days after registration, and for whom SolarCity Corp. [REDACTED]

**NDNC Subclass B** is defined as:

1 All individuals registered on the National Do Not Call Registry whom  
2 SolarCity Corp. called more than one time in a 12-month period on  
3 their cellular or landline phone where each call was made more than  
30 days after registration, and for whom SolarCity Corp. [REDACTED]  
[REDACTED]

4 As shown below, for all of these classes and subclasses, Plaintiff meets each requirement of Rule  
5 23(a), Rule 23(b)(3) and Rule 23(b)(2).

### 6 **III. THE TELEPHONE CONSUMER PROTECTION ACT**

7 The TCPA is a consumer-protection statute that Congress enacted after finding that robo-  
8 calls had become a serious problem, posing a nuisance and invading the privacy of telephone  
9 subscribers nationwide. *See* TCPA, 47 U.S.C. § 227 note; *see also* 105 Stat. 2394 § 2(10). To  
10 address this issue, Congress prohibited callers from using automated telephone dialing systems to  
11 contact cellular customers without the prior express consent of the called party. Congress also  
12 granted a private right of action with statutory damages for victims of illegal calls, to facilitate both  
13 public and private enforcement. *See* 47 U.S.C. § 227(b). Despite these measures, illegal robocalling  
14 has persisted as a low-cost, high-volume way of attempting to contact consumers, and continues to  
15 skate the edges of federal and state law.<sup>2</sup>

16 Courts routinely certify class actions to remedy telemarketing campaigns that systematically  
17 violate the TCPA. *See, e.g., Mendez v. C-Two Grp., Inc.*, 2015 WL 8477487, at \*2 (N.D. Cal. Dec.  
18 10, 2015) (certifying a class of plaintiffs who received text messages from defendant); *Lee v.*  
19 *Stonebridge Life Ins. Co.*, 289 F.R.D. 292 (N.D. Cal. 2013) (certifying a class of plaintiffs who  
20 received text messages from defendant) (Seeborg, J.); *Bee, Denning, Inc. v. Capital All. Grp.*, 310  
21 F.R.D. 614 (S.D. Cal. 2015) (certifying automated call class); *Birchmeier v. Caribbean Cruise Line,*  
22 *Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014) (certifying a class of plaintiffs which alleged that  
23

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24 <sup>2</sup> *See* Prepared Statement of The Federal Trade Commission “Stopping Fraudulent Robocalls: Can  
25 More Be Done?”, before the Committee on Commerce, Science and Transportation, Senate, 113th  
26 Congress 8 (2013), *available at*  
27 [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf)  
28 [trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf)  
be/130710robocallstatement.pdf (last visited Dec. 14, 2016) (describing complex systems through  
which telemarketers attempt to circumvent the law by involving third parties to obtain lead lists,  
voice recordings, and autodialing services).

1 defendants made or benefitted from robocalls that “utilized a prerecorded voice to send the same  
2 type of message, from the same person, using the same technology”); *Abdeljalil v. Gen. Elec.*  
3 *Capital Corp.*, 306 F.R.D. 303, 306 (S.D. Cal. 2015) (certifying an autodialer class); *Booth v.*  
4 *Appstack, Inc.*, 2015 WL 1466247, at \*3 (W.D. Wash. Mar. 30, 2015) (certifying class of all persons  
5 who were called with pre-recorded messages).

6 The TCPA also provides that “[a] person who has received more than one telephone call  
7 within any 12-month period by or on behalf of the same entity in violation of the regulations  
8 prescribed under this subsection” may bring an action for injunctive relief, damages, or both. 47  
9 U.S.C. § 227(c)(5). 47 C.F.R. § 64.1200(c), promulgated under Section 227(c), prohibits all  
10 telephone solicitations to “[a] residential telephone subscriber who has registered his or her  
11 telephone number on the national do-not-call registry. . . .” This regulation also applies to wireless  
12 telephone subscribers who have registered their numbers on the national do-not-call registry. 47  
13 C.F.R. § 64.1200(e).

14 The national do-not-call registry is a list containing the personal  
15 telephone numbers of telephone subscribers who have voluntarily  
16 indicated that they do not wish to receive unsolicited calls from  
17 commercial telemarketers. Commercial telemarketers are generally  
18 prohibited from calling phone numbers that have been placed on the  
19 do-not-call registry, and they must pay an annual fee to access the  
20 numbers on the registry so that they can delete those numbers from  
21 their telephone solicitation lists. So far, consumers have registered  
22 more than 50 million phone numbers on the national do-not-call  
23 registry.

20 *Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1234 (10th Cir. 2004). The FTC records  
21 complaints from consumers who have registered their numbers on the NDNC list, but have received  
22 telemarketing calls on their cell phones or landline phones anyway.<sup>3</sup> Despite the enactment of the  
23 NDNC list in 2003, there were still over 3 million consumer complaints made to the FTC in 2014  
24 alone.<sup>4</sup>

26 <sup>3</sup> Federal Trade Commission, *National Do Not Call Registry Data Book FY 2014*, at 8 (Nov. 19,  
27 2014) available at [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-  
data-book-fiscal-year-2014/dncdatabookfy2014.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2014/dncdatabookfy2014.pdf) (last visited Dec. 14, 2016).

28 <sup>4</sup> *Id.*

1 **IV. THE LEGAL STANDARD FOR CLASS CERTIFICATION**

2 A party seeking class certification must satisfy the four prerequisites of Rule 23(a):  
3 “(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named  
4 plaintiff’s claims and defenses are typical; and (4) the named plaintiff can adequately protect the  
5 interests of the class.” *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 583 (C.D.  
6 Cal. 2012) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)) (internal  
7 quotation marks omitted). In addition to meeting the requirements set forth in Rule 23(a), the  
8 proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research Inst.*,  
9 *Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Here, Plaintiff asks the Court to certify the classes and  
10 subclasses under Rule 23(b)(3), which permits class actions for damages where “the court finds that  
11 the questions of law or fact common to class members predominate over any questions affecting  
12 only individual members, and that a class action is superior to other available methods for fairly and  
13 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Plaintiff also seeks certification  
14 pursuant to Fed. R. Civ. P. 23(b)(2) which provides that “the party opposing the class has acted or  
15 refused to act on grounds that apply generally to the class, so that final injunctive relief or  
16 corresponding declaratory relief is appropriate respecting the class as a whole.”

17 The party seeking class certification bears the burden of proof in demonstrating that it has  
18 satisfied all four Rule 23(a) prerequisites and that their class lawsuit falls within one of the three  
19 types of actions permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186. The district court must  
20 conduct a rigorous analysis to determine whether plaintiffs met their burden to pursue their claims as  
21 a class action. *Id.* at 161. Nevertheless, Rule 23 “grants courts no license to engage in free-ranging  
22 merits inquiries at the certification stage.” *Amgen Inc. v. Connecticut Retirement Plans and Trust*  
23 *Funds*, 133 S. Ct. 1184, 1194-95 (2013).

24 **V. THE REQUIREMENTS OF RULE 23(a) ARE READILY MET**

25 **A. Numerosity Is Satisfied**

26 Rule 23(a)(1) requires the classes to be “so numerous that joinder of all members is  
27 impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed number that satisfies the  
28 numerosity requirement, as a general matter, a class greater than forty often satisfies the

1 requirement, while one less than twenty-one does not. *See Californians for Disability Rights, Inc. v.*  
2 *Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008). Here, numerosity cannot reasonably  
3 be disputed. The Autodialer Class is sufficiently numerous because Defendant made [REDACTED]  
4 [REDACTED] Verkhovskaya Rpt. ¶ 17. Likewise, because  
5 a large percentage of these calls, as well as Defendant's calls to landlines, were made to consumers  
6 on the national Do Not Call list, the NDNC Class is sufficiently numerous as well.<sup>5</sup> The A  
7 subclasses are only slightly smaller given that many of the calls at issue were made [REDACTED]  
8 [REDACTED] Verkhovskaya Rpt. ¶ 17.  
9 The B subclasses are even larger than the A subclasses because they exclude only a fraction of the  
10 consumers [REDACTED] In sum, the proposed classes and subclasses contain many  
11 thousands of class members.

#### 12 **B. Commonality Is Satisfied**

13 To satisfy the commonality requirement of Rule 23(a)(2), Plaintiff must identify "a common  
14 contention" that is "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.  
15 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). That is,  
16 "determination of [the contention's] truth or falsity will resolve an issue that is central to the validity  
17 of each one of the claims in one stroke." *Id.* All questions of fact and law need not be common to  
18 satisfy the rule. *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2009). "What matters to class  
19 certification is . . . the capacity of a classwide proceeding to generate common *answers* apt to drive  
20 the resolution of the litigation." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (emphasis in original).

21 Here, there are multiple common questions. To start, Plaintiff's and the classes' and  
22 subclasses' claims arise out of a common nucleus of operative facts: SolarCity violated the TCPA  
23 by placing calls utilizing automated telephone dialing systems without the recipients' prior express  
24 consent and regardless of whether call recipients were listed on the NDNC list. Each class and

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25 <sup>5</sup> Federal Trade Commission, *Hundreds of millions say "Do Not Call"* (Nov. 19, 2015), *available at*  
26 <https://www.consumer.ftc.gov/blog/hundreds-millions-say-do-not-call> (last visited Dec. 14, 2016)  
27 ("As of October 1, 2015, the Do Not Call list includes more than 222 million numbers."); 2009  
28 *Economic Report of the President* (Jan. 16, 2009) at 244, *available at* [https://georgewebush-whitehouse.archives.gov/cea/ERP\\_2009.pdf](https://georgewebush-whitehouse.archives.gov/cea/ERP_2009.pdf) (by 2007, 72 percent of Americans had registered on the national Do Not Call list).

1 subclass member has suffered the same injury and is entitled to statutory damages under the TCPA.

2 This common nucleus of operative facts gives rise to several common and controlling factual  
3 and legal questions that will resolve each class members' TCPA claims against Defendant in one  
4 stroke, including:

- 5 • Whether SolarCity placed the calls in question using an automated telephone dialing  
6 system as contemplated by the TCPA;
- 7 • Whether SolarCity placed the calls in question to consumers registered on the NDNC  
8 list;
- 9 • Whether SolarCity's conduct constitutes a violation of the TCPA;
- 10 • Whether SolarCity and the classes and subclasses are entitled to actual, statutory, or  
11 other forms of damages, and other monetary relief;
- 12 • Whether Plaintiff and the classes and subclasses are entitled to treble damages based  
13 on the willfulness of SolarCity's conduct; and
- 14 • Whether Plaintiff and the classes and subclasses are entitled to equitable relief.

15 Accordingly, the requirement of commonality is satisfied.

### 16 C. Plaintiff's Claims Are Typical

17 Rule 23(a)(3) requires the representative party to have claims that are "typical of the claims  
18 or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members  
19 have the same or similar injury, whether the action is based on conduct which is not unique to the  
20 named plaintiffs, and whether other class members have been injured by the same course of  
21 conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The typicality  
22 requirement is "permissive" and requires only that the representative's claims are "reasonably co-  
23 extensive with those of the absent class members; they need not be substantially identical." *Hanlon*  
24 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

25 Here, the essential characteristics of Plaintiff's claims and those of the respective classes and  
26 subclasses he seeks to represent are more than significant—they are practically identical. First,  
27 plaintiff's and class and subclass members' claims result from the exact same conduct: SolarCity  
28 called him on his cellular phone using an autodialer without his prior express consent and despite the  
fact that he was registered on the NDNC list. Arisohn Decl. Ex. P (LUCERO000012-18); Ex. Q

(Lucero Dep.) at 52:29-21, 55:24-56:6, 74:7-20, 158:16-21, [REDACTED]; Ex. S (LUCERO0000004-06); Verkhovskaya Rpt. ¶ 31. These calls all had the same purpose; they were all attempts by SolarCity to peddle its solar products. As a result, Plaintiff's rights under the TCPA were violated by the same common course of conduct to which SolarCity subjected every other class and subclass member, and Plaintiff suffered the exact same injury as all other class and subclass members. Accordingly, Plaintiff's claims satisfy the typicality requirement of Rule 23(a).

**D. Plaintiff Will Adequately Represent The Classes and Subclasses**

Rule 23(a) also requires the representative parties to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has established a two-prong test for this requirement: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon*, 150 F.3d at 1020). Here, Plaintiff satisfies both prongs.

First, Plaintiff is an adequate class representative. The "due process touchstone of adequacy and fairness of representation must be judged in light of . . . the alternatives to class representation available." *Blackie v. Barrack*, 524 F.2d 891, 910 (9th Cir. 1975). Rule 23 "requires adequate representation. The alternative may be none at all." *Id.* at n.26. Here, Plaintiff has already demonstrated his adequacy and commitment to vigorously prosecuting this action by performing his duties as a named plaintiff. In that regard, Plaintiff searched for and produced documents relevant to this action, responded to Defendant's interrogatories, reviewed documents to be filed on his behalf, sat for a lengthy deposition, regularly corresponds with his counsel, and remains updated on the status of this case. Arisohn Decl. Ex. Q (Lucero Dep.) at 90:2-92:5. Furthermore, Plaintiff has the same interests as the class and subclass members who were also called by Defendant. Plainly, Plaintiff is an adequate class representative.

Plaintiff's lawyers are also qualified to serve as class counsel. Rule 23(g) requires that a district court appoint class counsel for any class that is certified. *See* Fed. R. Civ. P. 23(g)(1)(A). In appointing class counsel, Rule 23(g) lists four factors for consideration: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in

1 handling class actions or other complex litigation and the type of claims in the litigation;  
2 (3) counsel’s knowledge of the applicable law; and (4) the resources that counsel will commit to  
3 representing the class. Fed. R. Civ. P. 23(g). In evaluating the adequacy of counsel, “a court may  
4 examine the attorneys’ professional qualifications, skill, experience, and resources. The court may  
5 also look at the attorneys’ demonstrated performance in the suit itself.” *In re Emulex Corp.*, 210  
6 F.R.D. 717, 720 (C.D. Cal. 2002).

7 Plaintiff’s counsel, Bursor & Fisher, P.A. and Nathan & Associates, APC, are lawyers who  
8 have experience litigating class action claims. *See* Arisohn Decl. Ex. T (Bursor & Fisher, P.A. Firm  
9 Resume); Ex. U (Nathan & Associates, APC Firm Resume). Plaintiff’s counsel—already appointed  
10 interim class counsel in this matter (ECF No. 87)—have been appointed class counsel in dozens of  
11 cases in both federal and state courts, and have won multi-million dollar verdicts or recoveries in 5  
12 of 5 class action jury trials since 2008. *Id.* They have also been vigorously prosecuting this action  
13 through discovery and litigation of Defendant’s motions to dismiss and motion to stay, have retained  
14 experts, conducted substantial research regarding the legal issues, and thoroughly investigated the  
15 factual issues in this action. They have no conflicts of interest and will prosecute this action  
16 vigorously on behalf of Plaintiff and the classes and subclasses. These facts demonstrate that Bursor  
17 & Fisher, P.A. and Nathan & Associates, APC are qualified to serve as class counsel.

## 18 **VI. THE PROPOSED CLASSES AND SUBCLASSES SATISFY RULE 23(b)(3)**

19 Rule 23(b)(3) authorizes class certification where “questions of law or fact common to class  
20 members predominate over any questions affecting only individual members,” and “a class action is  
21 superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.  
22 Civ. P. 23(b)(3); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010).  
23 Both of these requirements are met here.

### 24 **A. Common Questions of Fact or Law Predominate**

25 Rule 23(b)(3) requires that “questions of law or fact common to class members predominate  
26 over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). The analysis  
27 “presumes that the existence of common issues of fact or law have been established pursuant to Rule  
28 23(a)(2).” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Thus, the predominance

1 analysis “focuses on ‘the relationship between the common and individual issues’ in the case and  
2 ‘tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.’”  
3 *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) (quoting *Hanlon*, 150 F.3d at  
4 1022). The main concern is “the balance between individual and common issues.” *Id.* at 546  
5 (quotation marks and citation omitted). This does not mean, however, that individual issues need be  
6 entirely absent. “[F]ederal courts have recognized that individual issues will likely be present during  
7 class actions but that such issues should not prevent class certification so long as they do not  
8 override the underlying common question.” *Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 WL  
9 4156364, at \*10 (N.D. Cal. Sept. 5, 2008); *Chun-Hoon v. McKee Foods Corp.*, 2006 WL 3093764,  
10 at \*5 (N.D. Cal. Oct. 31, 2006) (stating “even though individual issues exist, they do not bar class  
11 certification”). Rather, “[c]lass-wide issues predominate if resolution of some of the legal or factual  
12 questions that qualify each class member’s case as a genuine controversy can be achieved through  
13 generalized proof, and if these particular issues are more substantial than the issues subject only to  
14 individualized proof.” *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002); 7AA  
15 Wright & Miller, Fed. Prac. & Proc. § 1778 (3d ed. 2011) (Rule 23(b)(3)’s predominance  
16 requirement is satisfied when “common questions represent a significant aspect of [a] case and . . .  
17 can be resolved for all members of [a] class in a single adjudication”). Notably, Rule 23(b)(3) calls  
18 only for “a showing that questions common to the class predominate, not that those questions will be  
19 answered, on the merits, in favor of the class.” *Amgen Inc.*, 133 S. Ct. 1184 at 1191.

20       Here, the foregoing discussion regarding commonality and typicality demonstrates that the  
21 claims of Plaintiff and classes and subclasses arise out of a common course of conduct. As  
22 discussed above, Defendant employed uniform practices with regard to each class and subclass  
23 member: (i) it placed calls using an automated telephone dialing system, (ii) each call was designed  
24 to sell Defendant’s solar products and services, (iii) each call was made without the call recipient’s  
25 prior express consent, and (iv) each call was made without regard to whether call recipients were  
26 registered on the NDNC list. Where, as here, “liability turns on an employer’s uniform policy that is  
27 uniformly implemented, . . . predominance is easily established” and “[c]lass certification is usually  
28 appropriate.” *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008); *Kernats v.*

1 *Comcast Corp.*, 2010 WL 4193219, at \*8 (N.D. Ill. Oct. 20, 2010) (where “a class challenges a  
2 uniform policy or practice, the validity of that policy or practice tends to be the predominant issue in  
3 the ensuing litigation”). And the main issue in this case—Defendant’s use of autodialers to call  
4 Plaintiff and class members—even taken alone, is sufficient to establish predominance. *James v.*  
5 *JPMorgan Chase Bank, N.A.*, 2016 WL 6908118, at \*1 (M.D. Fla. Nov. 22, 2016) (“Class-wide  
6 proof can answer the predominant questions (whether Chase auto-dialed each person and whether  
7 each call violates the TCPA).”); *Avio, Inc. v. Alfoccino, Inc.*, 311 F.R.D. 434, 446 (E.D. Mich. 2015)  
8 (“The heart of this litigation arises from a single campaign of faxes sent by a single set of  
9 Defendants. Each allegedly violative fax was identical in its substance. And critically, all of the  
10 potential class members’ claims are brought under the same federal statute and are based on identical  
11 legal theories that can be uniformly resolved together.”).

12       The sheer number of common issues in this case demonstrates that such issues predominate.  
13 For instance, the relief sought is identical in each class and subclass member’s case. The TCPA  
14 provides a statutory damages award of \$500 for each violation of the Act. 47 U.S.C. § 227(b)(3)(C).  
15 Each member of the classes and subclasses is seeking the same statutory damages, the only  
16 difference between claims being the number of times a class or subclass member was called,  
17 allowing damages to be easily calculated. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670-71 (7th  
18 Cir. 2015) (“a common method for showing individual damages—a simple formula could be applied  
19 to each class member’s employment records . . . would be sufficient for the predominance and  
20 superiority requirements to be met.”) (quoting *Newberg on Class Actions* § 12:2). As such,  
21 Plaintiff’s and the classes’ and subclasses’ claims will be subject to common proof, and this  
22 litigation is well-suited to the class action process.

23       These numerous common issues are not outweighed by the potential for individual issues of  
24 consent that are belied by the record and thus entirely speculative. *Booth v. Appstack, Inc.*, 2015 WL  
25 1466247, at \*11 (W.D. Wash. Mar. 30, 2015) (“Defendants’ contention that the sources from which  
26 SalesGenie obtained the telephone numbers may have procured class members’ consent to receive  
27 robocalls does not rise above speculation, which is inadequate to defeat class certification.”). In *Lee*  
28 *v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292 (N.D. Cal. 2013) (Seeborg, J.), for instance, the

1 defendant argued that class certification was inappropriate because “the dialing lists used here were  
2 generated, at least in part, from websites where individuals had consented to receiving” text  
3 messages and would thus “require individualized treatment of each class member’s claim.” *Id.* at  
4 295. The court rejected this argument outright, noting that if there is evidence of consent, “merits  
5 discovery should reveal it, with whatever consequences that may then have to the size of the class or  
6 whether any class action can proceed.” *Id.* Likewise, in *G.M. Sign, Inc. v. Franklin Bank, S.S.B.*,  
7 2008 WL 3889950 (N.D. Ill. Aug. 20, 2008), the court indicated that individual issues of consent are  
8 unlikely to ever predominate over common issues in a TCPA class action:

9 As [plaintiff] points out, the claims at issue in this case arise from a  
10 uniform type of alleged violation of a single statute. Though some of  
11 the issues [defendant] identifies have the potential to require individual  
12 resolution, there can be no question that the common issues identified  
13 above will be a main focus of this case going forward.

14 Moreover, the obstacles [defendant] perceives to predominance and  
15 superiority are largely illusory. One example is the contention that an  
16 individualized inquiry is required to ascertain membership in the class  
17 because every class member would have to adduce evidence that prior  
18 consent was not given. Such evidence would be within the knowledge  
19 of the potential class member, and a party would need a good-faith  
20 basis to believe that he or she satisfies the class definition before  
21 making a representation to this court to that effect.

22 *Id.* at \*6. Numerous other courts have reached similar conclusions.<sup>6</sup>

23 <sup>6</sup> See, e.g., *Stern v. DoCircle, Inc.*, 2014 WL 486262, at \*8 (C.D. Cal. Jan. 29, 2014) (finding that  
24 predominance was satisfied despite the potential for individualized consent issues to arise, and  
25 noting that if “individualized inquiries threaten to swamp common questions, the Court can revisit  
26 the propriety of class certification”); *Knutson v. Schwan’s Home Serv., Inc.*, 2013 WL 4774763, at  
27 \*10 (S.D. Cal. Sept. 5, 2013) (despite asserted individual issues of consent, “common questions . . .  
28 predominate”); *Whitaker v. Bennett Law, PLLC*, 2014 WL 5454398, at \*6 (S.D. Cal. Oct. 27, 2014)  
29 (“The central issue of Bennet Law’s liability is whether or not they placed unsolicited, automated  
30 calls to the putative class member’s cellular telephones, which predominates over the subsequent  
31 issues of intent and the existence or nonexistence of prior express consent with each individual  
32 call.”); *Avio, Inc. v. Alfocchino, Inc.*, 311 F.R.D. 434, 446 (E.D. Mich. 2015) (“While it is  
33 undoubtedly true that some individualized issues may arise involving consent, there is no indication  
34 that those issues are so widespread so as to overcome the numerous and foundational issues common  
35 to all members of the class.”); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674,  
36 687 (S.D. Fla. 2013) (“[T]he issue of consent does not, in this case, present an individualized issue  
37 destroying the cohesiveness of the class.”); *CE Design v. Beaty Const., Inc.*, 2009 WL 192481, at \*9  
38 (N.D. Ill. Jan. 26, 2009) (predominance satisfied despite the possibility of individual consent  
39 inquiries because “whether the plaintiffs received unsolicited faxes . . . is the singular question that  
40 predominates above all else” and claims fell “within the purview the same federal statute and [arose]  
41 from the alleged conduct of one defendant acting over a very short period of time”); *Hinman v. M &  
42 M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008) (“At present, I have no reason to  
43 believe that the resolution of any individual issues will consume more time or resources than the

1 Moreover, the subclasses are all defined in such a manner that adjudication of their claims  
2 will not involve any individual issues of consent. Because the A subclasses exclude any consumers  
3 for whom [REDACTED] there is zero evidence that any of the members of these  
4 subclasses consented to being called by SolarCity with the use of an autodialer or to overriding their  
5 registrations on the NDNC list. There is thus no reason to believe that there will be any  
6 individualized inquiries regarding the consent of the these subclass members beyond mere  
7 speculation.

8 Likewise, because the B subclasses are defined by [REDACTED], the  
9 legal effect of this language can be decided on a classwide basis. [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] Such consent is ineffective for purposes of the TCPA. Express consent must be “clearly  
13 and unmistakably stated.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir.2009)  
14 (quoting Black’s Law Dictionary 323 (8th ed. 2004)). Indeed, in *Satterfield*, the Ninth Circuit ruled  
15 that consent to receive calls from one business does not constitute consent to receive calls from a  
16 different business. *Id.* In addition, the FCC has ruled that “the seller must secure a written  
17 agreement **between itself and the consumer** showing that the consumer agrees to receive autodialed  
18

19 resolution of common issues.”); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013)  
20 (“Class certification is normal in litigation under § 227, because the main questions, such as whether  
21 a given [call was made using an autodialer], are common to all recipients.”); *Chapman v. Wagener*  
22 *Equities, Inc.*, 2014 WL 540250, at \*15 (N.D. Ill. Feb. 11, 2014) (“Predominance, in any event, is a  
23 qualitative, not quantitative assessment, and the defendants have identified no basis to believe that  
24 this case will be different than the ‘normal’ § 227 class action in which the common issues arising  
25 from the near-simultaneous transmission, by the same defendant, of the same unsolicited fax  
26 predominate over potential distinctions between a small portion of the class.”); *Balbarin v. N. Star*,  
27 2011 WL 211013, at \*1 (N.D. Ill. Jan. 21, 2011) (“The possibility that some putative class members  
28 might ultimately be found to be outside the class does not preclude class certification.”).

24 In any event, “‘express consent’ has limited bearing on the predominance inquiry because it is not an  
25 element of a TCPA plaintiff’s prima facie case, but rather is an affirmative defense for which the  
26 defendant bears the burden of proof.” *Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed. Appx. 598, 600  
27 n.1 (9th Cir. 2011). See also *Sailola v. Mun. Servs. Bureau*, 2014 WL 3389395, at \*7 (D. Haw. July  
28 9, 2014); *Gaines v. Law Office of Patenaude & Felix, A.P.C.*, 2014 WL 3894348, at \*4 (S.D. Cal.  
June 12, 2014); *Elkins v. Medco Health Solutions, Inc.*, 2014 WL 1663406, at \*6 (E.D. Mo. Apr. 25,  
2014); *Heinrichs v. Wells Fargo Bank, N.A.*, 2014 WL 985558, at \*2-3 (N.D. Cal. Mar. 7, 2014);  
*Shupe v. JPMorgan Chase Bank of Ariz.*, 2012 WL 1344820, at \*4 (D. Ariz. Mar. 14, 2012); *Ott v.*  
*Mortg. Inv’rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1065 (D. Or. 2014).

1 or prerecorded telemarketing calls from the seller.” *In the Matter of Rules & Regulations*  
2 *Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1872 (2012) (emphasis  
3 added). Here, because the members of the B subclasses never consented to being called by  
4 SolarCity in particular and did not enter an agreement with SolarCity at all, Defendant called them  
5 without the requisite prior express consent. Accordingly, consent for the B subclasses can be  
6 determined on a classwide basis. *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1307-08  
7 (D. Nev. 2014) (“Kristensen therefore has advanced a viable theory of class-wide proof of lack-of-  
8 consent.”); *Taylor v. Universal Auto Grp. I, Inc.*, 2014 WL 6654270, at \*16 (W.D. Wash. Nov. 24,  
9 2014) (“The Court finds plaintiff has satisfied the predominance requirement with respect to his  
10 TCPA claim concerning the December 2009 “welcome” message, given that the predominant issue  
11 of prior express consent is subject to generalized proof on a classwide basis.”).

#### 12 **B. A Class Action Is Superior To Numerous Individual TCPA Actions**

13 A class action is the superior method to resolve the classes’ and subclasses’ claims as there is  
14 a substantial risk that their claims would be forfeited absent class certification. The TCPA does not  
15 provide for statutory fee-shifting, so any potential individual judgment would likely be dwarfed by  
16 the attorneys’ fees and costs incurred to obtain that judgment. As a result, without certification,  
17 class members will lose their rights by attrition, and Defendant will be able to continue its mass  
18 campaign of illegal telemarketing calls. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)  
19 (“The policy at the very core of the class action mechanism is to overcome the problem that small  
20 recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or  
21 her rights. A class action solves this problem by aggregating the relatively paltry potential  
22 recoveries into something worth someone’s (usually an attorney’s) labor.”) (quoting *Mace v. Van Ru*  
23 *Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). This alone demonstrates that resolution on a class-  
24 wide basis is the superior method of adjudicating the classes’ and subclasses’ claims. *Mendez v. C-*  
25 *Two Grp., Inc.*, 2015 WL 8477487, at \*8 (N.D. Cal. Dec. 10, 2015) (“The Court finds that a class  
26 action is superior to thousands of individual small-claims cases.”).

27 In addition, even if individual lawsuits were filed, hearing essentially the same case over and  
28 over again would be patently inefficient. In contrast, class certification would avoid the need for

1 multiple individual actions and duplicative proceedings that would inevitably result in enormous and  
2 unnecessary expense to both the judicial system and its litigants. Class certification, on the other  
3 hand, would promote consistency of rulings and judgments, while at the same time giving all parties  
4 the benefit of finality by resolution in a single action.

5 **C. The Proposed Classes And Subclasses Are Ascertainable**

6 “Although there is no explicit requirement concerning the class definition in FRCP 23, courts  
7 have held that the class must be adequately defined and clearly ascertainable before a class action  
8 may proceed.” *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011) (internal quotation  
9 omitted). “The class definition must be sufficiently definite so that it is administratively feasible to  
10 determine whether a particular person is a class member.” *Id.* The Ninth Circuit only requires that  
11 the class definition describe objective criteria that allow a class member to identify himself or herself  
12 as having a right to recover or opt out based on the description, without the use of subjective factors  
13 like state of mind. *McCrory v. Elations Co., LLC*, 2014 WL 1779243, at \*7-9 (C.D. Cal. Jan. 13,  
14 2014). Accordingly, courts in this district and elsewhere routinely find that TCPA classes are  
15 ascertainable. *See, e.g., Steinfeld v. Discover Fin. Servs.*, 2014 WL 1309352, at \*3 (N.D. Cal. Mar.  
16 31, 2014) (finding on a motion for final approval of class action settlement that a class defined as all  
17 persons who received calls made to their cellular phones through the use of an ATDS was  
18 “sufficiently definite and readily ascertainable”); *Knutson v. Schwan’s Home Serv., Inc.*, No. 2013  
19 WL 4774763, at \*5 (S.D. Cal. Sept. 5, 2013) (finding the proposed class ascertainable because  
20 “[w]hether a customer received an autodialed or artificial/prerecorded call may be determined  
21 objectively.”).

22 Here, the classes and subclasses are defined so that class members can be identified  
23 exclusively through the use of objective criteria in an administratively feasible manner. [REDACTED]

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED] This process would involve an automated process through which a  
3 copy of the NDNC list with dates of registration would be cross-referenced against [REDACTED]  
4 [REDACTED] Ms. Verkhovskaya's process for identifying the NDNC Class has been approved in  
5 multiple cases. *Id.* Ex. E.

6 Members of the Autodialer Class and the NDNC Class can then be culled down to isolate  
7 members of the subclasses. Autodialer Subclass A and NDNC Subclass A can both be determined  
8 by reference to Defendant's own internal documents [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 Members of the Autodialer Class and NDNC Class [REDACTED] can easily be  
14 identified from Defendant's own documents and excluded from the A subclasses. Verkhovskaya  
15 Rpt. ¶ 29. Because leads [REDACTED] can be easily identified from Defendant's own  
16 records in an administratively feasible manner, Autodialer Subclass A and NDNC Subclass A are  
17 both ascertainable. *Bates v. Dollar Loan Ctr., LLC*, 2014 WL 5469221, at \*3 (D. Nev. Oct. 28,  
18 2014) ("Defendants' argument that the required data retrieval and analysis will be tedious is wholly  
19 unpersuasive. It would be far more tedious to hold trials for each alleged TCPA violation at issue  
20 here; this is precisely the reason that class actions exist."); *Saulsberry v. Meridian Fin. Servs., Inc.*,  
21 2016 WL 3456939, at \*5 (C.D. Cal. Apr. 14, 2016) ("For the purposes of ascertainability, it is  
22 enough that the class definition describes 'a set of common characteristics sufficient to allow' a  
23 prospective plaintiff to "identify himself or herself as having a right to recover based on the  
24 description.") (quoting *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008)); *Abdeljalil*  
25 *v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303, 308 (S.D. Cal. 2015) ("This Court agrees with plaintiff  
26 that the class here is ascertainable because class members likely can be determined by objective  
27 criteria based on defendant's business records and the class members will likely be able to identify  
28 whether they received prerecorded calls from defendant.").

1 The process for identifying members of Autodialer Subclass B and NDNC Subclass B is also  
2 easily accomplished. [REDACTED]

3 [REDACTED]

4 [REDACTED]:

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED].

10 [REDACTED] Such general and broad language is  
11 essentially meaningless and devoid of legal significance. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Once the calls and phone numbers for each class and subclass has been identified, they can  
22 easily be matched up with the identities and contact information for class members through several  
23 alternative automated processes. Ms. Verkhovskaya would be able to “coordinate a data process via  
24 one or a combination of the data processors LexisNexis, TransUnion or Microbilt, that will identify,  
25 for a given telephone number, an overview of ownership records dating back up to ten years,  
26 including: owner name, address, and carrier associated with the telephone number.” *Id.* ¶¶ 23-24.

27 Ms. Verkhovskaya could also [REDACTED]

28 [REDACTED] or subpoena information from wireless carriers. *Id.* ¶¶ 25-28, Ex. F.

1 The classes and subclasses are thus all ascertainable. *Birchmeier v. Caribbean Cruise Line,*  
2 *Inc.*, 302 F.R.D. 240, 248 (N.D. Ill. 2014) (“[I]t is fairly clear that the identities of the persons whose  
3 numbers are on plaintiffs’ list of 930,000—indeed, the subscribers for those numbers at the time  
4 defendants called them—are sufficiently ascertainable.”); *Booth v. Appstack, Inc.*, 2015 WL  
5 1466247, at \*4 (W.D. Wash. Mar. 30, 2015) (finding TCPA class ascertainable where plaintiffs  
6 intended to rely on telephone carrier records and reverse look-up directories to identify class  
7 members); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, 2009 WL 2581324, at \*4 (N.D. Ill. Aug. 20,  
8 2009) (finding TCPA class ascertainable because “[plaintiff] may use the log and fax numbers to  
9 ‘work backwards’ to locate and identify the exact entities to whom the fax was sent”); *Bee, Denning,*  
10 *Inc. v. Capital All. Grp.*, 310 F.R.D. 614, 624 (S.D. Cal. 2015) (“These call recipients are readily  
11 identifiable using the same reverse look-up approach that Plaintiffs plan to use to identify members  
12 of the junk fax class.”); *Stern v. DoCircle, Inc.*, 2014 WL 486262, at \*3 (C.D. Cal. Jan. 29, 2014)  
13 (consent goes to the merits, and is “not an argument as to whether the class definition is  
14 administratively feasible.”).

## 15 **VII. THE PROPOSED CLASSES SATISFY RULE 23(b)(2)**

16 Alternatively, the Court should certify an injunctive relief class. Rule 23(b)(2) permits  
17 certification of an injunctive relief class where the prerequisites of Rule 23(a) are satisfied and “the  
18 party opposing the class has acted or refused to act on grounds that apply generally to the class, so  
19 that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a  
20 whole.” Certification under Rule 23(b)(2) does not require predominance, superiority, or  
21 ascertainability. *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 541 (N.D. Cal. 2012); *In re*  
22 *Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015).

23 Certification under Rule 23(b)(2) is appropriate in this case. Defendant has acted on grounds  
24 generally applicable to the class by calling class members on their cellular phones with an autodialer  
25 and by calling class members who were registered on the NDNC list. Plaintiff’s request for  
26 injunctive relief can be satisfied “with indivisible equitable relief that benefits all class members at  
27 once,” by requiring that Defendant stop making the types of calls at issue in this case. *Ries*, 287  
28 F.R.D. at 541. This “case exemplifies the kind of action that may be appropriate for certification

1 under Rule 23(b)(2)” because Plaintiff seeks relief from harassing phone calls, and stopping those  
2 calls would benefit all class members at once. *Id.*

3 **VIII. CONCLUSION**

4 For the reasons set forth above, Plaintiff respectfully request that the Court enter an order (i)  
5 certifying the classes and subclasses, (ii) appointing Plaintiff as Class Representative for the the  
6 classes and subclasses, (iii) appointing Bursor & Fisher, P.A. and Nathan & Associates, APC as  
7 Class Counsel, and (iv) granting any such further relief as this Court deems reasonable and just.

8  
9 Dated: December 14, 2016

Respectfully submitted,

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